# NATURAL LAW AND THE JURIDICAL PRINCIPLE OF SUFFICIENT REASON

*by Eduardo García Máynez*

Ever since the Sophists of Greece opposed to the order of the law an order of nature, valid by its own essence and spontaneity, there has been repeated, in juridical literature, as a kind of *Leitmotiv* of an interminable symphony, the idea that there exists a law which does not oblige through human prescription but through the intrinsic goodness of its command. The *ius naturale* has been opposed to the *ius positivum* as the model to its copy, the objective to the subjective, the perfect to the imperfect, the eternal to the mutable. While some authors admit the coexistence of the two orders, others think that only one of them can be authentic law. For those who, with Leibniz, hold that justice is the inseparable attribute of the juridical, there is no other law than the objectively valid one; for those who declare with Kelsen that only that order is juridical which is capable of securing its own efficacy—independently of the goodness of its prescriptions—there is only positive law.

There are, then, three theoretical possibilities concerning the relation between natural law and positive law: the theory of the two orders, which states the coexistence of both; juridical positivist monism, which negates the validity of natural law; and *ius naturae* monism, which holds that there exists no other law than the one intrinsically valid. The partisans of the dualist position cannot escape the problem of the connection between the two orders, nor that of possible conflicts between the norms of either. This leads them necessarily—especially on the hypothesis of such discrepancy—to the notion of primacy of one order as against the other, either the natural over the positive or the positive over the natural. But in this case they usually do not consider that their procedure is equivalent to recognizing that only *one* of the orders is genuine law, and therefore to invalidating the discrepant, or opposed, norm of the order declared to be of inferior rank.

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Those who accept connections of supra- or sub-ordination between the two laws put the difficulty in the same form in which, for example, within a federation the problem of opposition between federal law and local juridical rules is being resolved. This supposes the hierarchical diversity of such orders and the subordination of the latter under the former or, in other words, the principle that the supreme criterion of validity is given by a basic norm.

The question is similar to that of the connection between national and international law, or that of antinomy between juridical or other orders to which a common ultimate foundation of validity is attributed.

The logical scheme adopted in these cases is always the same: when within a normative system there exists a plurality of partial orders of different rank, their validity depends on their subjection to the norms of the order postulated as supreme. When, on the contrary, it is not a question of different orders of a complex system but of systems whose bases of validity are different, the opposition between contradictory norms is solved, from the point of view of each of these orders, with absolute denial of the normative nature of the others. This, on the other hand, is equivalent to suppressing the conflict. Thus, for example, proceeds the organ of the state when, on the hypothesis of an antinomy between the law in force and an ethical demand, or a postulate of *ius naturae,* it denies validity to the latter and applies the norms of the legal order in force.

Let us now ask what is the supreme logical principle which enters into play in all these cases. It is none other but the principle of sufficient reason. This principle can, in the juridical field, be expressed as follows: Every legal norm, in order to be valid, requires a sufficient reason for its validity. This is all logic teaches in this case: if a norm is valid it is because it has a sufficient foundation of validity. But what is or in what consists this foundation is not any more a logical problem but one of positive law. In other words: the principle can only be applied when there exists a supreme criterion of juridical validity. And this latter must be postulated by the basic norm of each juridical order.

The principle not only presupposes that there is an ultimate criterion of validity but it claims the uniqueness of this criterion. The duality, or in general the plurality, of the criteria would rob them of their character of authentic or, to express it differently, of ultimate criteria. For various criteria can only subsist side by side if their rank is unequal; which means that there is one of superior rank and that this, at the same time, is unique.

But if the supreme criterion of validity has to be unique it is impossible to admit that juridical orders of different foundation can be equally obligatory; and therefore it is impossible to defend the coexistence—in a plane of coordination—of a positive and of a natural juridical order; or, to speak

more precisely, the coexistence of two laws, one formally valid and the other valid in and for itself.

The contraposition positive law—natural law presupposes at bottom the recognition of two different foundations. The postulate for positive legal orders is always, by the internal logic of the positivistic attitude, an extrinsic one. The postulate for natural law is, by the internal logic of that doctrine, an intrinsic one.

From the point of view of public power there is no other law than the one created or recognized (implicitly or explicitly) by the organs of that power. Or, expressed differently, only those are juridical norms which arise from the formal sources: legislation, custom, or jurisprudence, and which are not opposed to the fundamental law. The validity of these norms depends on the combination of a series of requirements concerning the process of creation; moreover, it depends on the requirement that they must not oppose the norms of the partial order of superior rank or, ultimately, the basic norm. What is in question, therefore, is not any reference to the goodness or justice of the norms, but only to the regularity of the process of their creation and their compatibility with the fundamental or supreme norm.

On the other hand, both in the case of isolated norms and of entire systems of law, their justification can be made dependent on the goodness or the intrinsic justice of their commands. There arises thus, beside the criterion already examined, another criterion which, instead of taking into account the form of creation of the norms or their compatibility with norms of higher rank, considers only the objective validity of the legal precepts in question. While the first of the two criteria does not refer to the content but the form in which the norms in question have been created, or their relation with others of the system, the second criterion can lead to the result that what is extrinsically or formally valid as law does yet lack intrinsic validity. To recognize that a law exists as part of a juridical order and at the same time negate its justification is possible only when this law is examined successively in the light of the two criteria, that of formal and material validity in the positive sense, and that of intrinsic validity in the axiological sense. In that case, it is both possible to admit the existence of an order which pretends to be valid as law and which has efficacy, and to put in doubt its justice.

When it is not the normative power of individual norms but that of a whole legal system that is in question, it must be remembered that its creators and executives never subordinate the attribute of the system's normative power to the judgment about goodness or justice of those obligated under the system. To submit in this point to the opinion of the subjects would not only presuppose the negation of the system's authority; it would also mean to disavow the validity of its norms. Philosophers adduce,

to justify this position, the lack of universally recognized criteria of valuation. If neither science nor juridical philosophy, said Radbruch in 1932, are capable of showing us what is just and what is unjust, then will and power must be called upon to decide what is to be valid as law and what not.[1] As there are no unequivocal rules for judging the justice of norms valid at a certain place and time, and as, on the other hand, it is indispensable that there exist an effective juridical order for human behavior, the only way to create it is to establish an authority which "decides in an authoritarian way about the criteria which must have validity in social action. . . ."[2] This does not mean that the creators of the juridical order and those in charge of maintaining it do not pretend that the norms of the order are not just; the pretension of justice exists in every case. The only thing the organs of the state cannot admit is that the obligatory essence of these norms be made dependent on rules different from the official criterion. For the organs of the state there is no other law than that created and recognized by them in accordance with the directives of the basic norm. They cannot therefore concede juridical validity to the law formulated or recognized in another form. If in a judicial procedure, for example, one of the parties pretends to base its demand on a principle of justice opposed to the positive laws, the judge must hold himself to the latter and deny procedural acknowledgment to this principle. By the internal logic of his own position, therefore, he is obligated to apply one single rule of validity: that adopted by the public power. *Auctoritas, non veritas, facit legem.*

Equally decisive is the attitude of the advocate of natural law in face of the command of those in power. If the rulers pretend that their laws should be faithfully obeyed, such pretension cannot be founded on the fact that they are in condition to coerce this observance. When a rule of conduct appears wrapped in the verbal clothing of norms we must not interpret it as expression of the will of him who has formulated it; insofar as it imposes duties or confers rights its meaning can only be this: to connect with the cases which its hypothesis foresees certain consequences that represent a just regulation of such cases. The juridically prescribed must not be confounded with what the legislator or those subject to the law wish that it be; juridically, there must be what is juridically valid, independent of whether someone disposes thus or ordains something else. A similar thing is true of subjective rights: when in such and such circumstances justice demands that a right be recognized to me, the legislator must recognize it to me, which presupposes that the attributive norm does not create such right nor must it be interpreted as a gracious concession by the public power.

The criterion applied in this case does not consider the form of creation of each precept or its compatibility or incompatibility with the basic norm; it refers exclusively to the intrinsic goodness or justice of the rule. To follow this criterion one does not have to inquire which relation exists

between the legal norm in question and other norms of the given legal order; it is sufficient to ask whether it can or cannot be interpreted as realizing juridical values.

The same criterion can be applied to the examination of an entire legal system. In this case, the obligatory force of the system does not appear to reside in its existence or positivity; the only thing in question is its objective value. But, as the use of the axiological criterion results sometimes in the assertion that the norms of a given law, far from realizing values, foment despotism and injustice, there arises inevitably the problem of the relation between the two criteria; and one cannot help asking which, in case of conflict, ought to prevail.

What the natural law doctrines of revolutionary character have in common, at least in their critical aspect, is the assumption that above the positive order there exists a natural order of intrinsic validity whose norms must prevail over those of the positive law. Even when the coexistence of the two legal orders is accepted, as is the case in a number of theories, the justification of the positive law is made dependent on its conformity with the *ius naturae*. A positive law conflicting with natural law is regarded as not truly law and as lacking obligatory force.

Not all natural law doctrines, such as those of Callicles or Sophocles (in *Antigone*), have a revolutionary character; their purpose is often to justify the order in force. When this is their purpose, the validity of this order, or these orders, is made to consist in the conformity or concordance with the principles of *ius naturae*. Instead of contraposing the former to the latter, what is looked for is a relation between both. The natural law is then regarded as a model or paradigm of the historical orders in question, and the value of the latter grows or decreases in the degree in which they copy their archetype. In these Platonic conceptions the natural law exhibits all the attributes of the Idea, and the positive law is a simple copy of it. The natural law is an ideal order, immutable, perfect, eternal; the positive law a real order, mutable, defective, and perishable. The one exists and is valid in itself and for itself; the other is law in the degree and the measure in which it partakes of the Idea, or the Idea is present in it. What is most plausible in these doctrines is the notion that the meaning of the positive order is found in its tendency of realizing certain ideal requirements which transcend, as Nicolai Hartmann says, their own ideality and thus become modulating forces of the existent.

Within the Aristotelian conception, on the other hand, natural law represents the end toward whose realization the positive law has to aspire. But as, in accordance with Aristotle's metaphysics, "the general can only act and exist in the individual, the positive law, as *accidens* gives 'existence' to the juridical substance."[3] As the fire burns in any place, "the same in Hellas as in Persia,"[4] the universal law must always manifest itself in the

written law and the latter, in turn, must in any case tend toward the realization of the natural order.

The natural law thinkers establish a very close—indeed, a necessary—connection between the validity they attribute to the contents of the *ius naturae* and the origin of the latter's norms. In the teaching of Callicles, for example, the reason that the natural order incarnates justice and has objective validity is due to the fact that its origin lies not in the decisions of the citizens in the legislative assembly but in the dictates of nature. The naturality or spontaneity of these dictates guarantees their immutable character and determines the superiority that is axiologically attributed to them, as against the mutability of human law. Here is revealed the intention of attributing to the higher order a firm foundation and of securing for its norms a derivation which escapes every suspicion of arbitrariness. As the norms of the positive law are human creations, the danger that they may become instruments of oppression and injustice depends on the free—and at times corrupted—will of its authors.

Even though the supreme aspiration of the philosopher of justice is to discover the objective foundation of the law in order to surround it with a halo of universality and permanence, such aspiration is thwarted by the diversity—and at times the acute contrast—of the theories about such foundation. The champions of positivism use this "Achilles' heel" to formulate one of the strongest arguments in support of their own position. While their opponents discuss without any agreement among themselves the "nature" in which the "true" law has its origin, the holders of power formulate the rules regulating human society and create, for their efficacy, the monopoly of enforcement. Thus the value of the legal order is postulated as supreme, to the detriment of an ideal of justice which all pursue but none succeeds in defining in univocal form.[5] The legal order neither does nor can make its obligatory force dependent on the opinions of the subjects, and it has behind itself an organization which guarantees the application of its precepts.

The weak point of the thesis which sees in this interlocking of authority and power the foundation of the juridical order is an incorrect interpretation of the concept of security. The partisans of positivism forget that the only authentic security capable of creating a genuine—a real and not an apparent—peace, is the one founded on justice. When the excesses of the legal order, whose life rests only in the force of the tyrant, overstep certain limits, security disappears, resistance is organized, and the order founded on fear is finally destroyed by the onslaught of the revolution.[6] When the ultimate reason of validity of any system excludes the possibility of admitting, with regard to it, a duality of foundations, one must *a fortiori* arrive at the conclusion that for the organs of public power the so-called "natural law" is no law. And inversely, by the internal logic of their own position,

for the partisans of the *ius naturae* the unjust positive order is no genuine law but a simple "phenomenon of power."[7] It is true that the goodness of a legal order can be made to derive from its greater or smaller content of justice; but in this case the criterion of validity used is not the official one. The proof is that as soon as this legal order stops to realize the values which, supposedly, constitute its own prototype, its justification—and its juridical essence—have to be negated in accordance with the canon of *ius naturae*.

For similar reasons, when it is declared that the only authentic law is the one "effectively" ruling the life of a community at a certain moment of its history, the application of this "principle of effectiveness" can result in the conclusion that the precepts which the dogmatic jurist or the natural law philosopher consider as valid from their corresponding viewpoints, are not law either, if they lack efficacy.

If thus the attributes of formal validity, intrinsic validity, and efficacy do not imply each other reciprocally, neither do they exclude each other. Therefore, sometimes they coincide in one and the same rule of conduct and even in a set of rules. A legal disposition duly promulgated can at the same time be efficient and just. In such a conjunction the three attributes come together in a single norm, as they can also coincide in a whole body of law, or in the totality of the elements of a system. The union of the three characteristics in all norms of a juridical order would represent the limit or ideal case of realization of justice in a juridically organized society. An order whose norms would fully realize the juridical values, not only in the stage of formulation but also in the final stages of application and fulfillment, would be a perfect order and would deserve the name of law from any of the three points of view. In this case the different perspectives would be referred to a common object and would hence have to be considered as different aspects of one single reality. The philosopher would judge it in the light of the idea of justice; the sociologist would see it as an efficient organization of human society; and the dogmatic jurist would interpret it as a set of rules united by a common reference to the fundamental norm of a concrete state.

The purpose of realizing juridical values in a determined historical situation leads necessarily to the establishment of a political organization; but as soon as such organization exists, it claims for itself the monopoly of formulation and application of the juridical norms and regards itself obligated to substitute the material criterion of validity by a purely extrinsic one. Therefore, it denies to the subjects the right to doubt the obligatory nature of its mandate, and asserts that there are no valid norms but those which, directly or indirectly, can be referred to the fundamental law.

The dialectic development of the juridical idea, which begins with the acknowledgment of the ideals of justice, leads to the creation of an author-

ity which, even though its goal is the realization of these ideals, sees itself forced to deny them, as meta-legal criteria of valuation, since otherwise it would have to acknowledge two criteria of validity and hence the possibility of antinomies and conflicts. The axiological criterion is thus superseded by a purely extrinsic one. The dualism appears then as the transitory and relative opposition of the two initial moments of a single development which culminates in the over-arching synthesis of both; and the synthesis is achieved when the attributes of formal validity and of justice coincide in one and the same legal order.

Just as the positive law tends toward becoming just law, so the natural law tends toward becoming positive law. Between the juridical ideal and the fact of positivity appears the social organization charged with realizing, through its norms endowed with validity, the values which constitute the prototype of a positive order. This aim is achieved only when the concurrence of the two attributes, of formal and objective validity in one and the same system, eliminates the possibility of value conflict. When the equilibrium is destroyed and the battle resurges between the dictates of justice and those of the valid norms, then there appears inevitably a relation of tension; and the material (axiological) criterion of validity is opposed by the parties to the formal criterion which the holders of power consider as the only one applicable. The opposition can manifest itself in many forms. Its intensity depends on the degree of discrepancy between the opposite criteria. It is possible that the critique of the valid law only pursues the reform of that order; but in extreme cases it can occur that the discrepancy brings about an attitude of resistance or even leads to revolution.

The revolutionary movements offer a new example of the dialectic process in which the juridical idea develops itself. When the positive law does not reflect—at least to a certain degree—the values which give it sense, the dialectic process begins anew. Its first moment consists in the affirmation of the order which does not correspond any more to the ideals of justice. Against this law, to which only formal validity is attributed, surges the revolution as a negating movement, and the process culminates in a new order which officially consecrates the desires and aspirations of those who provoke and realize the movement. Thus, once again, the coincidence of the two criteria is, supposedly, achieved within another positive order, and through the internal logic of the process the revolutionary power converted into sovereign authority stops being the champion of justice and becomes in turn the paladin of legality.

The union of the attributes of formal validity and intrinsic validity in one and the same juridical order represents not only the overcoming of its possible antagonism but also the best guarantee that this order be respected. When the subjects are convinced that the valid law realizes justice, they regard the norms of this law as intrinsically valid, and obedience appears

spontaneously. But if no such value is attributed to the norms, far from feeling bound by the law, the individuals feel themselves subjected only to power. The unjust order, enforced by the despot on the basis of the principle of legality, is negated by the subjects in the light of the axiological model. In this way the relation of tension reappears. It breaks the harmony; there is no more correspondence between what the state considers as law and what is valid as such for the juridical conscience of the citizens. The efficiency of the system begins to weaken and the battle of valuations provokes resistances and conflicts whose gravity increases in the measure in which the discrepancy grows. It is then that the problem acquires dramatic dimensions; for now it ceases to be academic and becomes a vital problem which must be solved at any cost. Which of the two points of view must be chosen, not only as a philosophical or scientific criterion but as a norm of action? Is it enough to adjust oneself to one of them proposed, respectively, by the dogmatic jurist and the juridic philosopher, or does one have to look for a higher principle above the original attitudes?

Even though the positions described differ among themselves and lead to the knowledge of different objects, it is in any case a question of attitudes assumed by man, whether as philosopher or as sociologist or as jurist of the state. And man, or better the person, cannot be locked indefinitely in any one of the three viewpoints. He feels the urgency of embracing an exhaustive point of view, capable of comprehending a firm knowledge of the limits and relations of all three of them. This desire responds to a moral necessity rather than a purely theoretical consideration. For, from the diversity of the typical attitudes, and above all from the opposition between philosophical and dogmatic posture, can grow conflicts which may put in the balance the ethical destiny of every person. When, as in *Antigone* or in the very real case of Socrates, one has to choose between the legal command and the dictates of justice, the problem is no more a merely technical but a vital one in front of which one has forcibly to take a stand. The last word in every case is pronounced by the person in conflict; and the only indisputable imperative is the faithfulness to one's own conscience. Socrates and Antigone followed opposite paths but they both obeyed their inner voice.

Although from a strictly logical point of view it is impossible to affirm the simultaneous applicability of the two laws, it is indubitable that the theory of the *ius naturae* has played, and is continuously playing, a role of extraordinary importance in the life of nations. Conscious or not of the juridical principle of sufficient reason, dictatorships could become defenders of positivistic monism and support their demands at the point of bayonets; but in the light of this principle the juridical conscience of individuals and peoples will always oppose the pretended law of force with the indom-

itable force of that other law which is not derived from the arbitrariness of the mighty but from eternal values.

At each step one hears the trivial objection that the *ius naturale* is not true law because it is not positive. Those who reason this way are not aware that the force of the doctrine of *ius naturae,* the force which converts it into the ferment and motor of history, is precisely the fact that the ideals it postulates hover above the fact of positivity and are at one and the same time, as Stammler would say, the polar star of social reality and the touchstone of all institutions.

Even though it is true that we do not have infallible criteria for the just and the unjust, this must not lead us to an attitude of resigned abdication before the demands of those who have forgotten juridical ideals. Let us concede that there exists no definition of justice acceptable to everyone. How can we deny, however, that there is a common fund of convictions and sentiments about this value? Far from constituting a privilege of the strong, its realization is an obligation for all members of the political community. The responsibility of such realization is common to all since as individuals we not only are "subjects" but also "citizens" in the sense Rousseau gave to these words. On the other hand, the problem of justice is not only an academic question but an eminently practical task which interests all and to the solution of which we all can—in larger or smaller degree—contribute. Sancho was not a jurist but he knew how to be a good judge in his island of Barataria.

NOTES

1. G. Radbruch, *Rechtsphilosophie,* fünfte Aufl., Stuttgart, K. F. Koehler Verlag, 1956, I 10, p. 179.
2. Hans Welzel, *Mas allá del derecho natural y del positivismo jurídico,* trans. Ernesto Garzón Valdés, Universidad Nacional de Córdoba, Córdoba (R.A.), 1962, p. 27.
3. J. Sauter, *Die philosophischen Grundlagen des Naturrechts,* Wien, Verlag von Julius Springer, 1932, p. 43.
4. *Nicomachean Ethics,* V, p. 1134 b 25.
5. Cf. Welzel, *op. cit.,* "Derecho Natural y Positivismo Juridico," pp. 11-45.
6. Cf. E. García Máynez, *La definición del derecho,* Mexico, Editorial Stylo, 1948, Cap. VII, v.
7. Cf. R. Laun, *Derecho y moral,* trans. J. J. Bremer, Centro de Estudios Filosóficos de la Universidad Nacional Autónoma de México, 1959.